

November 1, 2013

Mr. Elton Mason
Washington State Trucking
P.O. Box 633
Kirkland, Washington, 98083

Re: Disadvantaged Business Enterprise (DBE) Complaint: DOT#2012-0257

Dear Mr. Mason:

The Federal Highway Administration (FHWA) has completed its investigation of your complaint against the Washington State Department of Transportation (WSDOT) and the Seattle Tunnel Partners (STP), prime contractor for the Alaskan Way Viaduct (AWV) Bored Tunnel Project (the Project).

Your complaint alleged that WSDOT is in non-compliance with DBE program requirements by failing to provide meaningful monitoring and oversight related to the Project when:

- WSDOT determined that STP used adequate good faith efforts to find another DBE to substitute for Grady Excavating, Inc. (Grady) after Grady was decertified and WSDOT determined that it no longer could be counted toward the contract goal
- WSDOT failed to provide adequate oversight of STP's good faith efforts to achieve the project's 8% DBE goal

FHWA's Office of Civil Rights and Division Office staff investigated your complaint by interviewing WSDOT and STP project staff, you, and over eight additional DBEs in the Seattle area and reviewing relevant documentation.

The Project has a DBE goal of 8%, which was known to all potential design-build candidates at the time of advertisement of the Request for Proposals. STP committed to meeting the 8% goal as a condition of award. In fact, STP stated that it planned to "exceed" the goal.

Federal regulations provide that once a DBE goal has been set, the contractor is obligated to make good faith efforts to meet the goal, by either obtaining enough DBE participation to meet the goal or by documenting its good faith efforts to do so. In addition, STP is obligated under Part 7 of Appendix 6 of its contract with WSDOT to demonstrate through regularly submitted progress reports that it is meeting the goal or to submit evidence that it is making good faith

efforts to meet the 8% contract goal. “Good faith efforts” are defined in the federal DBE regulations as a showing that the contractor “took all necessary and reasonable steps to achieve a DBE goal . . . which, by their scope, intensity and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.” Appendix A to 49 CFR Part 26

In determining whether a bidder’s good faith efforts were sufficient, the recipient must “consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements.”

WSDOT, as a recipient of federal transportation funds and under the terms of its contract with STP, is responsible for monitoring STP’s performance to ensure compliance with DBE program requirements, including applying legal and contract remedies available under Federal, state and local law. 49 CFR §26.37(a).

The investigation found that the facts supported your allegations as well as those of many additional DBEs with similar experiences. Therefore, pursuant to 49 CFR §26.103(c), the FHWA finds that there is reasonable cause to find WSDOT in noncompliance with its obligations under the DBE program requirements for the reasons set forth below:

- While STP ultimately replaced Grady with another DBE, it did not follow the procedures set forth in the regulations. 49 CFR §26.53(g). STP placed artificial barriers in its RFP, and created hardships for DBE respondents that were not required of Grady. Among other things, STP required the minority-owned DBEs to submit a bond, provide both personal and financial information, and undergo an electronic bid-submission process, none of which were required of Grady. The RFP that STP used to replace Grady required the DBEs to own 20 trucks and to commit all trucks full-time to the Project. These requirements eliminated most of the small DBE hauling firms from consideration and exceed what is required under the DBE rules to ensure such firms perform a commercially useful function. WSDOT, once made aware of artificial barriers in STP’s procurement policies, was obligated to intervene and make meaningful attempts to correct the problem. WSDOT’s “hands-off” approach to STP’s practices used to attain DBE participation does not meet the requirements of DBE program regulations to provide oversight and ensure compliance from program participants such as STP.
- WSDOT has failed to provide the requisite oversight to ensure STP is meeting its contractual commitment to meet the DBE goal or provide documentation of meaningful

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good faith efforts to do so. When STP does hire DBEs, it issues “not-to-exceed” contracts. STP leads DBEs to believe they will work for a certain contract amount, but dismisses them early and either self-performs the remainder or hires a non-DBE to complete the work. Further, STP’s strict low-bid policy continues to impact its ability to meet the DBE goal. In fact, as of March 2013, STP had achieved a DBE participation rate of less than 1 percent. It is clear that STP is not actively and aggressively using all measures that one would reasonably undertake if intending to meet the Project’s DBE goal; it continues to engage in pro forma efforts that do not yield DBE participation while submitting inflated DBE participation reports based upon unsubstantiated commitments. WSDOT has failed to intervene when there is clear evidence to support that STP is not making adequate good faith efforts to achieve the Project goal which was a condition of contract award.

Pursuant to 49 CFR §26.103(c), WSDOT must reply within 30 days to indicate whether it wishes to begin conciliation proceedings. As part of such proceedings, FHWA requires WSDOT to initiate the following:

- As a result our of finding of noncompliance in managing the DBE program, WSDOT must take all appropriate actions against STP available under its contractual agreement
- WSDOT must work with STP to identify specific actions that will be taken to achieve the 8% DBE goal by the Project’s completion date in 2015
- WSDOT must revise its DBE Program Plan to include how the agency, going forward, will institute effective monitoring and oversight measures for all contracts, including the design-build model, to ensure contractors either meet contract goals or provide documentation of meaningful good faith efforts to do so

Should WSDOT fail to comply with DBE program regulations, pursuant to 49 CFR §26.101(a), it may be subject to formal enforcement action or appropriate program sanctions, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied.

If you have any questions regarding this matter, please contact Martha Kenley at FHWA’s Office of Civil Rights. Ms. Kenley may be reached at (202) 366-8110, or, via email at: martha.kenley@dot.gov.

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Sincerely,



Warren S. Whitlock
Associate Administrator for Civil Rights

cc: Dan Mathis, FHWA Washington Division
Martha Kenley, FHWA, HCR
Jodi Petersen, FHWA, Washington Division

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